grounds, that the stock is viewed as a share in the corporation — the legal entity; or, taking the *chose* in action theory, as a rule of convenience to overcome the difficulty of getting the corporation and the shareholder together.[24] It is difficult to discover upon what reasoning the courts proceed. Too often they say that the *situs* of the stock is here or there, and go no further into the question.[25]

THE USE OF THE POWER OVER INTERSTATE COMMERCE FOR POLICE PURPOSES. — Does the power to regulate commerce between the several states include the power to use such regulations to promote the general welfare, or is the use restricted to securing merely the prosperity of that commerce? Only within recent years has this question been authoritatively answered. The first case [1] in which there was presented a regulation of interstate commerce to achieve what may be briefly designated a police purpose was the Lottery Case [2] in 1902. There a federal statute prohibiting the interstate shipment of lottery tickets by common carrier was sustained. Then the Pure Food and Drug Act,[3] the White Slave Act,[4] and the Lacey Act,[5] barring from interstate commerce game taken or killed contrary to the law of a state, were in turn upheld. Also a statute excluding from interstate and foreign commerce "movie" films of prize fights was approved in cases arising under foreign commerce.[6] On January 8, 1917, the Supreme Court sustained the Webb-Kenyon Law forbidding the shipment of liquor into a state in violation of any

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the domicil of the owner valid, are often cited as authorities on this matter, but wrongly, as they depend on entirely different principles. The power to tax at the *locus* of the certificate we have spoken of *ante*, note 20. The cases apparently upholding a tax of the stock at the domicil of the owner can be explained on the grounds that the tax is a personal tax, scaled to the individual power to pay. The stock is taken into consideration as one of the assets in determining the power to pay. Such a tax is perfectly valid.

[24] There is something to be said for the latter as a rule of expediency, though it is contrary to the recognized principles of international law to adjudicate the right of a person without jurisdiction of the person. *Cf.* the garnishment case, Harris *v.* Balk, 198 U. S. 215.

Clearly if jurisdiction of the shareholder is not to be required it is better to be thoroughly illogical and limit the jurisdiction to the domicil of the corporation rather than to extend it to all states where the corporation has consented to be sued.

[25] The principal case clearly seems to adopt the *chose* in action theory. It is to be regretted that the facts called for no decision as to the necessity of jurisdiction of the shareholder also.

[1] It is true that early in the nineteenth century embargoes were used for retaliation, but these applied only to foreign commerce, and are omitted from consideration in order to avoid raising the question of the relative scope of the power over foreign and interstate commerce.

[2] Champion *v.* Ames, 188 U. S. 321. See Paul Fuller, "Is there a Federal Police Power?," 4 COL. L. REV. 563. United States *v.* Popper, 98 Fed. 423, a district court decision in 1899, had upheld the exclusion from interstate commerce of medical devices intended for an immoral use.

[3] Hipolite Egg Co. *v.* United States, 220 U. S. 45.

[4] Hoke *v.* United States, 227 U. S. 308.

[5] Rupert *v.* United States, 181 Fed. 87. See Silz *v.* Hesterberg, 211 U. S. 31, 44.

[6] Weber *v.* Freed, 239 U. S. 325.

law of that state.[7] And on January 15, 1917, the White Slave Act was construed to forbid the interstate transportation of a woman for an immoral purpose,[8] even though no commercial intent be involved. So construed, the act was considered constitutional, although in result it amounts to a federal regulation of private morals. Within recent years there have been a number of other acts [9] dealing with various subjects, which have not yet been passed upon by the courts; one of the most seriously discussed of these was the Child Labor Law [10] passed on September 1, 1916. It forbids the shipment in interstate or foreign commerce of any article produced in a mine or factory employing child labor. Until recently the typical regulation under the commerce clause has been designed to protect, encourage, or expedite in some manner the conduct of commerce itself. Witness the regulation of rates and the Safety Appliance Act. The common feature of the measures described above, however, is that the power of regulation, often assuming the form of a flat prohibition, is being used to effect an end which is not only ulterior to commerce itself, but one the control of which would normally rest with the police power of the state.

The causes of this recent development of the latent commerce power are rather for the historian and the economist to elucidate than for the lawyer. The whole *post bellum* trend toward governmental centralization is involved; a complete analysis of this would require a critical examination of nearly the whole of American life and activity during the period. Economically the development of the railroad, the telegraph, and the telephone have reduced state lines to a geographical fiction. And as a result of the concentration of capital business has become more and more interstate and even nation wide.[11]

The results which this extended use of the commerce power are calculated to produce are to the lawyer of more immediate importance. These show at least two distinct tendencies. If the prohibition is absolute, and concerns a business that cannot survive without the use of interstate commerce, Congress by enacting the prohibition undertakes to impose an affirmative policy upon the whole country. If, however, the business can be conducted purely intrastate, or if the prohibition is quali-

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[7] James Clark Distilling Co. *v.* Western, etc. Ry. Co., Oct. Term, 1916, Nos. 75, 76.

[8] Caminetti *v.* United States, Oct. Term, 1916, Nos. 139, 163, 464.

[9] Obscene literature and articles designed for immoral use, 29 U. S. STAT. AT L. 512, c. 172. Meat Inspection Act, 34 STAT. AT L. 674; Nursery Stock Act, 37 STAT. AT L. 315; Prohibition of shipment of certain virus, serum, and toxin for the treatment of animals, 37 STAT. AT L. 832.

[10] Act of September 1, 1916, c. 432, § 1. "No producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P. M. or before the hour of six o'clock A. M."

[11] See JUDSON, INTERSTATE COMMERCE, 3 ed., 135.

fied, as in the Webb-Kenyon Act, Congress appears merely as an impartial referee aiding each state to work out its own social progress unhampered by the competition of more backward states. Thus the exclusion from interstate commerce of cotton goods manufactured by the aid of child labor would prevent such employment of children on any considerable scale; for, since there are only a few localities in the country in which that business can economically be conducted, the use of interstate commerce is essential to it in order that it may market its goods. Where, however, a given business can be carried on in any kind of a locality and with only a limited area for a market, exclusion from interstate commerce will not cause even a substantial suppression of that business. Thus the complete prohibition of interstate shipments of liquor would leave the liquor business largely untouched, for distilleries and breweries can suffice with local trade and thrive in almost any part of the country. But were Congress not to possess and exercise the power of excluding liquor from interstate commerce, the original package doctrine would render a dry state powerless to prevent the importation of liquor from a wet state and even its direct sale. This produces a situation in which the commercial interest of other states, however slight, would always prevail over the dry state's interest in its own welfare, however urgent, and Congress would be powerless to ameliorate the evil.[12] In other words, so long as one state continued to allow the manufacture of liquor, it could ship that liquor into every other state, to be sold in the original package, but by closing the channels of interstate commerce to liquor, each state is enabled to work out its own social salvation according to its own lights.[13] The Webb-Kenyon Act illustrates particularly well the prevention of this sort of outside interference with the police regulations of a state, in that it does not prohibit all interstate shipments of the article, but only those into a state in violation of any law of that state.[14] The two sorts of results, while distinct in nature, are not to be thought of as mutually exclusive; on the contrary, in regulations of such objects as child-labor products the two effects may be present side by side in nearly equal degree.

The authorities would seem to do away with the need of arguing the technical question of the constitutionality of so employing the commerce power for police purposes.[15] The legal justice and propriety of such a use, however, have often been seriously doubted.[16] But that Congress may properly deny the use of the mails to a person seeking to use them for an

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[12] See W. T. Denison, "States' Rights and the Webb-Kenyon Law," 14 COL. L. REV. 321, 324.

[13] The commercial interest of local manufacturers and sellers is also protected. Thus, if state A. forbids the manufacture and sale of certain impure food articles, persons within its borders cannot make nor sell such goods. Yet by means of interstate commerce the market of state A. is open to sellers from state B. This of course gives the outside dealer an entirely unfair advantage. A federal prohibition puts the local and the outside sellers on terms of equality.

[14] For a discussion of the constitutional basis of the Webb-Kenyon Act, see 17 COL. L. REV. 144.

[15] See T. I. Parkinson, "The Federal Child Labor Law," 31 POL. SCI. QUART. 531.

[16] See 38 AM. L. REV. 194. William R. Howland, "The Police Power and Interstate Commerce," 4 HARV. L. REV. 221. William Draper Lewis, "The Commodity Clause of the Hepburn Act," 21 HARV. L. REV. 595.

immoral, fraudulent, or otherwise improper purpose,[17] is now uncontested. The reasoning is that the post office, as an agency created by Congress, and under its sole control, may with entire propriety be closed to anyone seeking to use it for an improper purpose; otherwise Congress, through furnishing this agency, would be rendering affirmative aid in the perpetration of the scheme. Now it is quite true that the agencies of interstate commerce, unlike the post office, are not the direct creatures of Congress.[18] But over interstate commerce Congress has exclusive jurisdiction. Except in matters of local interest not requiring uniformity, the states may not act even in the absence of any legislation by Congress.[19] Thus a state has no power of itself to exclude liquor from interstate commerce within its borders.[20] Must Congress, then, possessing sole control over interstate commerce, allow that commerce to be used for the furthering of all sorts of injurious schemes? There is a certain rough analogy to the reasoning pursued by equity in refusing its aid to a plaintiff coming into court with unclean hands. The underlying principle is that an instrumentality created or controlled by the state ought not to be allowed to be used by any person to attain for his own benefit an end injurious to the community.[21] Not only is it constitutional, then, to look beyond the intrinsic qualities of the commodity offered for shipment, but to do otherwise would be to lose sight of the fact that commerce is but a means whereby various human ends are achieved. Any regulation that is completely intelligent should scrutinize not only the immediate subjects and agencies of commerce, but also the changes which are being wrought in the community through the use of this commerce. If this be kept in mind such regulations will not appear as perverted uses of the commerce power.

THE TERMINATION BY A SURETY OF HIS LIABILITY ON A FIDELITY BOND. — In the law of suretyship or guaranty the question frequently arises as to the effect to be given to a notice by the surety that he will no longer remain liable. The problem is squarely presented in cases where the surety or guarantor is bound for the faithful performance by an

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[17] *Ex parte* Jackson, 96 U. S. 727; *In re* Rapier, 143 U. S. 110.

[18] As to whether the right to engage in interstate commerce is conferred by the state or the federal government, see E. P. Prentice, "The Origin of the Right to Engage in Interstate Commerce," 17 HARV. L. REV. 20.

[19] Cooley *v.* Board of Wardens, etc., 12 How. (U. S.) 299.

[20] Leisy *v.* Hardin, 135 U. S. 100.

[21] It has been attempted to draw a distinction between the child labor product on the one hand and the lottery ticket, pure foods, and "movie" films on the other. In the latter, it is argued, the injury is not done until the goods reach the consumer, therefore interstate commerce participated in causing the injury. But in the former, since the injury is done to the producer, transportation causes no further injury, and therefore a prohibition is improper. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, 739. Henry Hull, "The Federal Child Labor Law," 31 POL. SCI. QUART. 519, 524. The fallacy of this view, however, is its failure to recognize that unless the child-labor product were able to reach its market through interstate commerce, its production could not be continuous. The power to regulate should not turn on the temporal accident of transportation succeeding the injury instead of preceding it.